

April 17, 2019

VIA FAX AND HAND DELIVERY

Ms. Catherine R. McCabe
Commissioner
State of New Jersey, Department of Environmental Protection
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**Re: Chemours and DuPont Joint Response to Statewide PFAS Directive,
Information Request and Notice to Insurers (the "Response")**

Dear Commissioner McCabe:

McCarter & English, LLP represents The Chemours Company, The Chemours Company FC, LLC (together "Chemours") and E.I. Du Pont de Nemours & Company ("DuPont" and together with Chemours as "Joint Respondents") in connection with the Statewide PFAS Directive, Information Request and Notice to Insurers (the "Directive") dated March 25, 2019 issued by the New Jersey Department of Environmental Protection ("Department") pursuant to the Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 *et seq.* ("Spill Act"); the Water Pollution Control Act, N.J.S.A. 58:10A-1 *et seq.* ("WPCA"); the Air Pollution Control Act, N.J.S.A. 26:2C-1 *et seq.*; and the Solid Waste Management Act, N.J.S.A. 12:1E-1, *et seq.* Joint Respondents, having received the Directive through their respective statutory agents on March 27, 2019, timely submit this Response on April 17, 2019.

In the Directive, the Department indicates that Joint Respondents are potentially responsible parties for PFAS contamination only at the Chambers Works facility in Pennsville and Carneys Point ("Chambers Works") in Salem County and the Parlin facility ("Parlin") in Middlesex County. Directive ¶¶ 28-41. But the Department then concludes that Joint Respondents' affiliation with the Chambers Works and Parlin facilities renders them responsible for PFAS contamination "across New Jersey[.]" Directive ¶¶ 22, 28-41. On this basis alone, the Department attempts to impose upon Joint Respondents, and several other companies, responsibility for estimating and establishing a funding source to provide for the investigation, testing, treatment, remediation, and cleanup and removal of PFNA, PFOA, and PFOS from "New Jersey's environment" and requests information from Joint Respondents regarding (i) their historic use of PFNA, PFOA, and/or PFOS in New Jersey; and (ii) their use of certain PFAS replacement chemicals in New Jersey. Directive ¶¶ 61, 67-69.

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Joint Respondents truly value their relationships with the State of New Jersey, which in the case of DuPont is rooted in more than a century of history, and in the case of Chemours, which has only been in existence since 2015, is newer but also greatly valued. These relationships are built on an established record of cooperation with the Department on comprehensive environmental investigations and investment at specific contaminated sites and in the State's economic growth. Joint Respondents currently are engaged in ongoing investigations at both the Chambers Works and Parlin facilities and remain committed to fulfilling their obligations under New Jersey's various environmental laws.

Joint Respondents, however, are greatly concerned with portions of the Directive, including (without limitation) unsupported factual findings in Paragraph 22 attributing them with responsibility for "significant PFAS contamination across New Jersey" and directions in Paragraph 67 requiring that they, together with several other companies, "meet collectively with the Department to discuss a good faith estimate for future costs to investigate, test, treat, cleanup, and remove PFNA, PFOA, and PFOS from New Jersey's environment and discuss Respondent's establishment of funding sources for same." We read this as a direction "to meet" and "to discuss" – which Joint Respondents are prepared to do – and not at this point a directive to actually fund anything. To the extent the Department has made a determination that Joint Respondents shall pay for the investigation, monitoring, testing, treatment, cleanup, and removal of PFAS throughout New Jersey, however, the Directive is not capable of compliance and is subject to objectively reasonable good cause defenses, especially so as a result of the Directive's unprecedented statewide scope.

Joint Respondents welcome a meeting with the Department and the other recipients to discuss an appropriate parameter of the Directive, as well as any additional facts and scientific information that the Department can furnish for Joint Respondents' evaluation. Joint Respondents reserve their rights to assert additional good cause defenses to the extent additional information underlying the Directive becomes available. Joint Respondents also reserve their rights to assert additional good cause defenses articulated by the other recipients of the Directive in their responses, or others that come to light. See *E.I. DuPont de Nemours and Co. v. Dep't of Env'tl. Prot. and Energy*, 283 N.J. Super. 331, 358 (App. Div. 1995).

The remainder of this Response sets forth the basis for Joint Respondents' good cause defenses. Nothing herein should be construed as an admission of liability or wrongdoing on the part of Joint Respondents as to the allegations in the Directive, nor with respect to any potential future directives or actions that the Department may take as a result of, or separate from, the Directive, including the requested meeting.

A. The Directive's Unprecedented Statewide Scope Renders It Overbroad

As a threshold matter, the scope of the Directive exceeds both the letter and the spirit of the Spill Act and the other statutes cited by the Department. The Directive seeks to impose upon each recipient responsibility for estimating and establishing a funding source to provide for the investigation, testing, treatment, remediation, and cleanup and removal of PFNA, PFOA, and PFOS "from New Jersey's environment" without any further geographic limitation. Directive ¶ 67. Further, the Directive does not address the applicability of any potential Federal or State permits rendering certain discharges outside the Spill Act's purview. N.J.S.A. 58:10-23.11c.

The Department has touted the Directive as an unprecedented, "first of its kind in the nation" action, in that it purports to require the recipients to conduct "a statewide assessment of the damage caused and to establish a fund to remediate the impacts". See NJDEP Press Release, "DEP Directs Five Chemical Companies to Fund Removal of Extensive PFAS Contamination Throughout the State" (Mar. 25, 2019), https://www.nj.gov/dep/newsrel/2019/19_0018.htm. The statewide breadth of the Directive is not just unprecedented, but untenable. New Jersey's environmental laws are intended and applied to address discharges of or contamination by hazardous substances at particular geographic locations. See, e.g., *Dep't of Env'tl. Prot. v. J.T. Baker Co.*, 234 N.J. Super. 234, 244 (Ch. Div. 1989) (interpreting "discharge" under the Spill Act and the WPCA as a release "from a **contained area**" (emphasis added)), *aff'd*, 246 N.J. Super. 224 (App. Div. 1991). The Spill Act, for example, expressly defines the phases of assessment, investigation, and remediation by reference to "sites":

- A "preliminary assessment" is defined as the "first phase in the process of identifying areas of concern and determining whether contaminants are or were present **at a site** or have migrated or are migrating **from a site**, and [which] shall include the initial search for and evaluation of, existing **site specific** operational and environmental information, both current and historic";
- A "**site** investigation" is defined to mean "collection and evaluation of data adequate to determine whether or not discharged contaminants exist **at a site** or have migrated **from the site** at levels in excess of the applicable standard";
- The definition of a "Person responsible for conducting the remediation" encompasses "(1) any person who executes or is otherwise subject to an oversight document to remediate **a contaminated site** . . . (4) any other person who discharges a hazardous substance or is in any way responsible for a hazardous substance...that was discharged at **a contaminated site**, or (5) any other person who is remediating **a site**"; and

- "Remedial action" is defined as "actions taken **at a site or offsite** if a contaminant has migrated or is migrating therefrom, as may be required by the department . . . designed to ensure that any discharged contaminant **at the site** or that has migrated or is migrating **from the site**, is remediated....."

N.J.S.A. 58:10-23.11b (emphases added).

Regulations promulgated under the Spill Act likewise link remedial obligations to a specific site or sites. N.J.A.C. 7:26C-1.1, *et. seq.* (entitled "Administrative Requirements for the Remediation of Contaminated Sites"). Indeed, the regulation governing the Department's issuance of the Directive provides that direction is to be provided to "persons who are in any way responsible for a hazardous substance **at a site**" and that the Directive should provide notice of "the connection of each such responsible party to the hazardous substances **at the site**." N.J.A.C. 7:26C-9.11(b)-(c) (emphases added). Such a connection (discussed further below) is a prerequisite to the recovery of costs and damages under the Spill Act, which has been construed to require proof connecting a putative responsible person with "the contamination **at the specifically damaged site**." *Dep't of Env'tl. Prot. v. Dimant*, 212 N.J. 153, 182 (2012).

The Directive improperly dissociates Joint Respondents' potential responsibilities from specific sites. As to Joint Respondents, the Directive identifies two sites at issue: (1) Chambers Works in Salem County, and (2) Parlin in Middlesex County. Directive ¶¶ 29, 32, 36. For clarity purposes, DuPont currently is a tenant at a portion of the Chambers Works facility, which DuPont previously owned and operated until it was transferred to Chemours in 2015, and Chemours currently is a tenant at the Parlin facility, which has been owned and operated by DuPont since the early 1900s. As the Department is aware, Joint Respondents already have assumed responsibility for comprehensive environmental investigation, testing, and cleanup activities at these two sites and their surrounding areas.

First DuPont and now Chemours have been investigating and remediating the entire Chambers Works site for many years pursuant to the Resource Conservation and Recovery Act under the direction of the Environmental Protection Agency ("EPA") and with the full participation of the Department, including with respect to PFAS. Chemours recently submitted to the Department a New Jersey compliant Preliminary Assessment/Site Investigation report for the entire site. DuPont has been investigating and remediating the Parlin site for many years under the direction of the Department, including with respect to PFAS.

Further, in 2009 DuPont agreed to implement a voluntary program to sample residential drinking water wells within a 2-mile radius of Chambers Works to evaluate the presence of PFOA in the off-site residential drinking water wells. This led to the installation of granulated activated carbon treatment systems in certain residences, and EPA Region 2 and the Department routinely were apprised of the

progress of the program. In June 2016, Chemours voluntarily began a follow-up survey and PFAS sampling program, which was expanded in phases through discussions with EPA Region 2 and the Department beyond the original radius and now includes samples up to 7 miles away from the site perimeter in a northeastern direction. Between 2016 and February 2019, a total of 341 residential wells were sampled and 138 granular activated carbon systems were installed and are included in a quarterly operation maintenance and monitoring program, and approximately 10 public water supply connections have been completed by Chemours.

After identifying and describing the Chambers Works and Parlin sites, the Directive then instructs Joint Respondents to join the other recipients to “discuss a good faith estimate for future costs to investigate, test, treat, cleanup, and remove PFNA, PFOA, and PFOS *from New Jersey’s environment* and to discuss Respondent’s establishment of funding sources for same.” Directive ¶ 67 (emphasis added). The Directive further identifies the anticipated future cost categories that the Department expects Joint Respondents and the other recipients to fund, all of which are described on a statewide basis. Directive ¶¶ 49-54. Yet the Directive does not suggest how purported discharges at Chambers Works or Parlin could reasonably be linked to statewide contamination – nor could it do so, as such broad migration is not supported by the ongoing investigation and sampling at the two sites.

Joint Respondents remain committed to detecting, understanding, and remediating environmental contamination on their properties and in any surrounding areas to which substances of concern may have migrated, in partnership with the Department, EPA, and community groups. The Directive attempts to impose strict liability on Joint Respondents and the other recipients for putative discharges at unspecified sites by unspecified parties *on a statewide basis*. The Legislature has not granted the Department authority to implement such a plan; nor has the Judiciary countenanced such a broad grant.

B. The Directive Attempts To Impose Liability Without Establishing A Causal Nexus

The Directive also contravenes New Jersey law requiring a proven causal nexus between a given discharge or contamination and the responsible party. As outlined above, the Directive identifies no facts supporting the contention that purported discharges at the Parlin and Chambers Works sites could result in statewide contamination, but nonetheless asserts that Joint Respondents are “responsible for the significant PFAS contamination across New Jersey” and are required to participate in funding statewide remedial activities. Directive ¶ 22.

New Jersey law forbids the Department from ignoring the causal link as the Directive has done. In the *Dimant* case, the Supreme Court of New Jersey explained that a “causal link is undoubtedly required to impose liability for damages

resulting from a discharge” under the Spill Act. 212 N.J. at 181. To establish such a causal relationship, it is insufficient “to simply prove that a [putative responsible party] produced a hazardous substance and that the substance was found at the contaminated site and ‘ask the trier of fact to supply the link.’” *Id.* at 182 (quoting *N.J. Tpk. Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 105 n.9 (3d. Cir. 1999)). Instead, evidence must be shown of “a reasonable link between the discharge, the putative discharger, and the contamination at the specifically damaged site.” *Id.* The Directive’s failure to even *suggest* any connection between purported PFAS discharges at Joint Respondents’ sites and the statewide obligations it seeks to impose falls far short of this standard.

C. Joint and Several Liability Is Improper Under These Circumstances

The Directive further exceeds the Department’s authority in declaring that Joint Respondents “shall be strictly liable, jointly and severally...for all cleanup and removal costs no matter by whom incurred.” Directive ¶ 59; *see also* ¶ 67. Although the Spill Act allows for joint and several liability, it is inappropriate to apply joint and several liability in a *statewide directive*, particularly so where the Department has failed to link Joint Respondents’ purported liability to a particular site-related harm.

In *Burlington Northern and Santa Fe Railroad Company v. United States*, the United States Supreme Court confirmed in the context of a CERCLA action for cleanup costs that strict liability under environmental laws does not justify departing from common-law standards for apportionment. 556 U.S. 599, 614-15 (2009). The *Burlington Northern* Court held that the common-law apportionment analysis reflected in *Restatement (Second) of Torts* applied:

When two or more persons acting independently caus[e] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he himself caused. But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm.

Id. at 614 (internal citations omitted) (alteration in original). In other words, apportionment is appropriate when a reasonable basis exists for determining the contribution of each cause to a particular harm. *Id.*

A responsible party’s liability under the Spill Act, if capable of apportionment, must be several, not joint. *Dep’t of Env’tl. Prot. v. Ventron Corp.*, 182 N.J. Super. 210, 222 (App. Div. 1981), *modified and aff’d on other grounds*, 94 N.J. 473 (1983). The Spill Act includes multiple mechanisms for divisibility. A responsible party who

"cleans up and removes a discharge of a hazardous substance" may bring an action for contribution "against all other dischargers and persons in any way responsible," and courts resolving Spill Act claims "may allocate the costs of cleanup and removal among liable parties using such equitable factors as the court determines are appropriate." N.J.S.A. 58:10-23.11f(a)(2)(a)(2) & (3).

The joint and several liability scheme contemplated by the Directive is fundamentally unfair. As framed, the Directive could place the entire liability for PFAS contamination throughout the entire state of New Jersey upon a single respondent without any opportunity for apportionment. In limiting damages and costs to those causally connected to specific sites and responsible parties, the Spill Act and its associated regulations reflect a reasonable and natural method of apportioning liability. The Department cannot eliminate Joint Respondents' rights to apportionment under the Spill Act simply by announcing that joint and several liability applies to funding obligations covering the entire state.

The Appellate Division's *Matejek v. Watson* decision does not compel a different result. See 449 N.J. Super. 179, 182 (App. Div. 2017). The *Matejek* decision involved an action for contribution among potentially responsible parties with respect to contamination at a particular site and not a Department-issued Directive to investigate potential contamination at unspecified sites throughout the entire State. Nevertheless, *Matejek* actually supports that apportionment of liability for remediation costs may be available based on the results of an investigative process. *Matejek* does not provide the Department authority to issue a near-boundless Directive untethered to specific contaminated sites **and** disallow Joint Respondents to rely upon the results of their ongoing investigation as a basis to apportion costs.

D. Obligations Imposed By The Directive Would Be Impracticable

As a further consequence of the Directive's unprecedented expansive reach, the Department's direction to fund future costs of investigation, treatment, cleanup, and removal of PFNA, PFOA, and PFOS across the entire state is not practicable and therefore beyond the scope of the Spill Act.

The Spill Act authorizes the Department to commence an action for "the cost of restoration and replacement, *where practicable*, of any natural resource damaged or destroyed by a discharge[.]" N.J.S.A. 58:10-23.11u.b(4) (emphasis added). The term "practicable" is not statutorily defined and has not been interpreted by New Jersey state courts. However, in *N.J. Dep't of Env'tl. Prot. v. Amerada Hess Corp.*, 323 F.R.D. 213 (D.N.J. 2017), the federal district court rejected the Department's position that "practicable" should be narrowly defined to mean "available," "capable of being done," or "not impossible." *Id.* at 215. Instead, the term is subject to a fact-specific reasonableness standard:

The Court finds that [the DEP's] burden . . . will be to establish by a preponderance of the evidence that [its] primary restoration plan is "practicable," meaning **"reasonably capable of being done" or "feasible" in light of "site-specific realities,"** including but not limited to the estimated length of time required to complete the restoration plan, the cost of the restoration plan, the extent to which the restoration plan is concrete, nonabstract and readily implementable rather than abstract or conceptual, the regulatory approvals required for the restoration plan from authorities other than NJDEP, and any other legal obstacles or barriers to the implementation of the restoration plan, including, for example, the current ownership of contaminated sites and the legal authority of the responsible parties to conduct restoration work at the sites.

Id. at 215–16 (emphasis added). In arriving at this standard, the District Court adopted the definition of "practicable" employed in New Jersey Supreme Court decisions reflecting the plain and ordinary meaning of the term in the context of other statutes. *Id.* at 223 (citing *IE Test, LLC v. Carroll*, 226 N.J. 166, 182 (2016)); *see also State v. Regis*, 208 N.J. 439, 448 (2011) (finding in the context of another statute that "practicable" means "reasonably capable of being accomplished; feasible").

Here, the Directive requires a small number of respondents to fund costs of investigation, assessment, remediation, and cleanup – essentially various efforts that culminate in restoration – for PFNA, PFOA, and PFOS contamination throughout the entire state, without regard or consideration for the "site-specific realities" or bare feasibility of such costs. Directive ¶ 67(b)-(h). On its face, the Directive offers no support for the notion that Joint Respondents or any of the other respondents (whether alone or in combination) are reasonably capable of bearing responsibility to assess, restore, and replace natural resources impacted by PFNA, PFOA, and PFOS in every corner of the state, and in multiple types of media throughout the State – water and waste water systems, irrigation wells, air, groundwater, surface water, soil sediments, and biota.

Moreover, even if it were reasonable to make Joint Respondents estimate the costs of investigation, assessment, remediation, and cleanup for PFAS contamination throughout New Jersey (which it is not), it clearly is impracticable, if not downright impossible, to provide a true good faith estimate in the timeline required by the Directive. The suggestion that such an estimate can be developed within 30 days ignores the amount of work that is necessary to estimate these obligations at a specific site, let alone the entire State of New Jersey. The

Directive's plan is distinctly "abstract or conceptual," in the words of the *Amerada Hess* court, and does not meet the Department's burden to establish practicability.

E. Costs Sought To Be Imposed By The Directive Would Be Unreasonable

Even if the steps directed by the Directive were practicable (which they are not), the costs they would impose are patently unreasonable. The Directive seeks to place upon Joint Respondents the financial burden to investigate, remediate, restore, and remove PFNA, PFOA, and PFOS throughout the state, which will exceed any rational calculation of actual statutory liability of a responsible party, as set forth above. For example, even *estimating* the costs of the statewide project contemplated in the Directive in a meaningful manner would be a wildly expensive, multidisciplinary effort, requiring detailed and extensive input and work from subject-matter experts in the sciences, economics, and accounting fields. The unreasonableness of costs assessed in connection with a remedial action under the Spill Act constitutes a good cause defense to outright compliance. *E.g., Matter of Kimber Petroleum Corp.*, 110 N.J. 69, 71 (N.J. 1988); N.J.A.C. 58:10-23.11b (definition of "cleanup and removal costs") (meaning "all direct costs associated with a discharge, and those indirect costs...incurred by the State...in the (1) removal or attempted removal of hazardous substances, or (2) taking of **reasonable** measures to prevent or mitigate damage to the public health, safety, or welfare...") (emphasis added).

F. Joint Respondents' Good Cause Defenses To Compliance Preclude Treble Damages

Treble damages for noncompliance with a Department directive are wholly inappropriate if a responding party possessed an objectively reasonable basis for asserting that the directive was invalid or inapplicable. N.J.S.A. 58:10-23.11 *et seq.*; *Woodland Private Study Group v. N.J. Dep't of Env'tl. Prot.*, 846 F.2d 921, 923 (3d Cir. 1988). Joint Respondents' defenses to the Department's unique "first of its kind" Directive are objectively reasonable.

The standards governing the interpretation of the Spill Act and the application of the Act's treble damages provisions were established in *Matter of Kimber Petroleum Corp.*, 110 N.J. 69 (N.J. 1988). The *Kimber* case recognized that even if a respondent's assertion is not ultimately vindicated, the Department is not entitled to treble damages if a defense meets the threshold of reasonableness in light of the surrounding circumstances. *Id.* at 83-84 (N.J. 1988) (holding that a good cause defense by necessary implication is provided under the treble damages provision of the Spill Act). On the facts at issue in *Kimber*, the Supreme Court of New Jersey determined that the Spill Act's combination of "joint and several liability, nearly absolute liability, the virtual elimination of substantive defenses, mandatory treble damages, and no pre-enforcement hearing" raised substantial doubt concerning the Act's constitutionality under the state and federal due process

guarantees, and that challenges thereto represented good cause defenses excusing full compliance under the circumstances. *Id.* at 79; see also *Matter of J.I.S. Indus. Serv. Co. Landfill*, 110 N.J. 101, 111–13 (1988) (holding that validity and enforceability of directive provisions ordering the payment of removal costs and threatening treble damages are subject “to any good-cause defense that may be raised” by responding parties).

As in *Kimber*, Joint Respondents’ defenses pertain to scope, liability, and damages issues that raise significant and legitimate questions under New Jersey law and have constitutional implications. Accordingly, the Department’s request for treble and other statutory damages based upon noncompliance (Directive ¶¶ 72-73) will not apply to Joint Respondents based upon the good cause supporting the defenses set forth above. Any effort by the Department to seek such damages would be arbitrary and capricious. See, e.g., *In re Petition of New Jersey Am. Water Co., for an Increase in Rates for Water & Sewer Serv. & Other Tariff Modifications*, 169 N.J. 181, 188 (2001) (overruling agency policy as arbitrary because it lacked a sufficient evidentiary basis in its general formulation and as applied); *County of Monmouth v. Dep’t of Corrections*, 236 N.J. Super. 523 (App. Div. 1989) (“Action by a State agency in contravention of State statutes and its own regulations is *per se* arbitrary and capricious because it violates express or implied legislative history.”).

G. The Directive Is Tantamount To An Administrative Rule

The Directive is an impermissible form of rulemaking because of the Department’s attempt to impose strict liability on a small number of respondents for unspecified PFAS contamination throughout New Jersey and not in compliance with New Jersey’s Administrative Procedures Act, N.J.S.A. 52:14B-1, *et seq.* See *Metromedia, Inc. v. Dir., Div. of Taxation*, 97 N.J. 313, 331–32 (1984). Regardless, even if subject to the rulemaking process, the Directive still would be substantively invalid for Joint Respondents’ good cause defenses.

* * * * *

Notwithstanding the good cause defenses referenced above, Joint Respondents look forward to their continued engagement with the Department in good faith to fulfill their obligations under New Jersey’s various environmental laws. To underscore, Respondents’ objections and assertion of defenses to the scope, substance, and legality of the Directive will not in any way diminish their willingness to engage with the Department constructively with respect to those commitments. Joint Respondents welcome any additional facts and scientific information that the Department can furnish for their evaluation, and also welcome a meeting to discuss appropriate parameters of the Directive, particularly if the other recipients are willing to meet with the Department and each other.

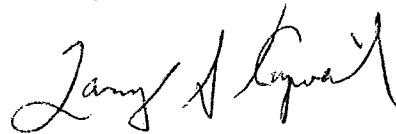
In the meantime, Joint Respondents are evaluating the Directive’s information requests and are willing to provide the Department with information in

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response to Directive paragraphs 68 and 69. Joint Respondents have begun to identify response information and will begin to provide such information on a rolling basis and pursuant to Joint Respondents' discussions with the Department regarding making that information available. Joint Respondents also intend to forward the Directive and this Response to their insurers, to the extent insurance coverage exists.

I am available to coordinate with the Department regarding any exchange of information and/or to discuss the logistics of any meeting with Joint Respondents, the Department, and the other recipients of the Directive.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lanny S. Kurzweil". The signature is fluid and cursive, with the first name "Lanny" being more prominent.

Lanny S. Kurzweil

cc: Shawn LaTourette, Deputy Commissioner Legal and Regulatory Affairs
Gwen Farley, Esq. (via Hand Delivery)
Michael Gordon, Esq. (via Hand Delivery)